MATERIALS ON CONFLICT OF LAWS

Volume 2

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and

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1987 - 1988

Faculty of Law

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We are grateful for the help that has been given over the years by Alice Ng, who worked on revisions of these materials for thirteen years. That she is now in business for herself may say something about the stamina required in that task. We are also grateful for the help of Nina Lester and of many other students over the past several years in the constant revisions in the organization and text of these materials.

For the first time these materials are showing the results of the work and interest of Professor Vaughan Black of Dalhousie University, who is sharing the task of making these materials ready for publication.

[Note: The Materials in this Part are identical to the Materials used in 1986-87]

Volume 2

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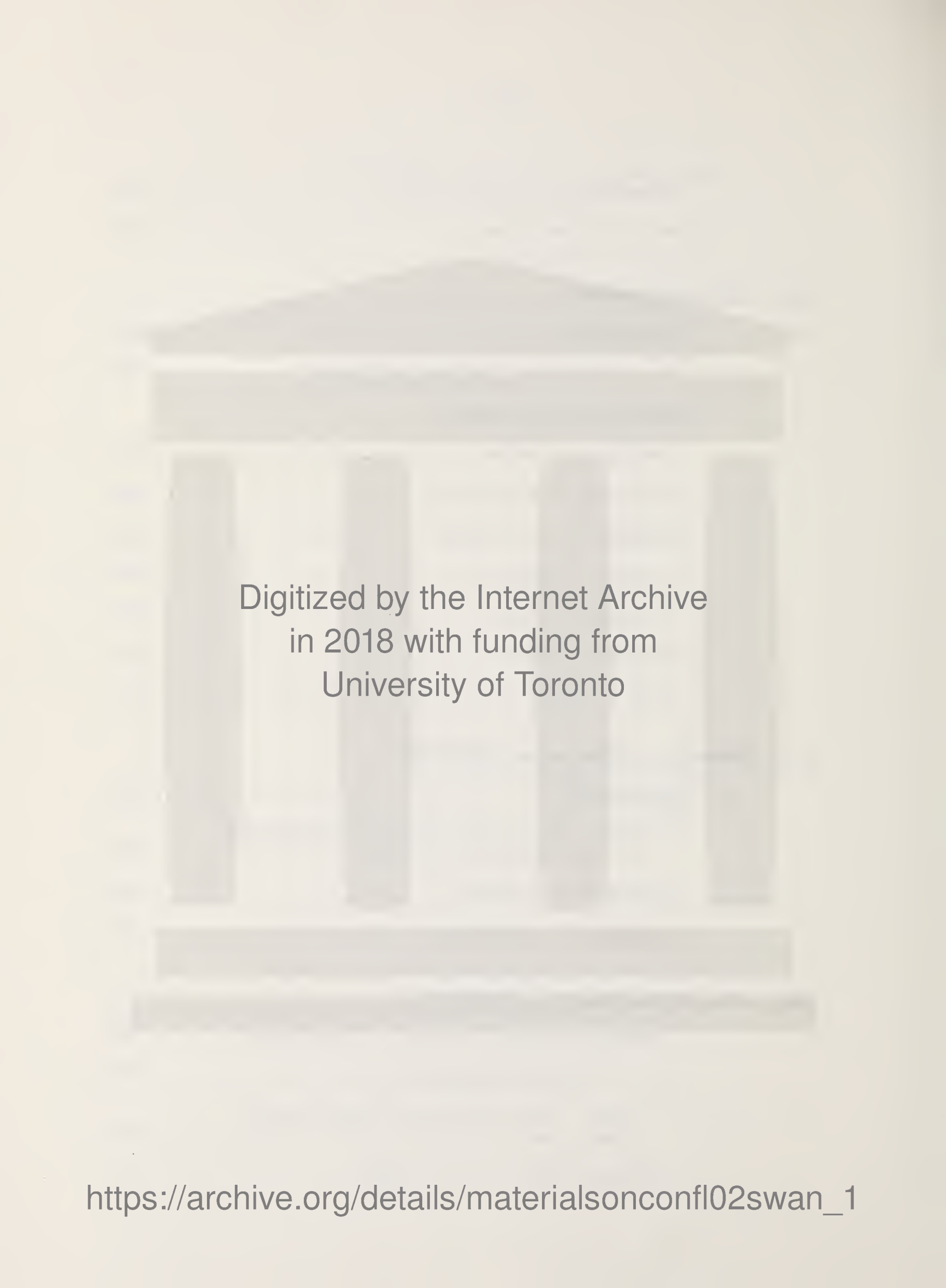

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PART C

I. WHERE WE HAVE COME FROM: A RE-INTRODUCTION

We have now seen the operation of the traditional rules of Conflicts in a number of substantive areas of the law. We have also explored some of the problems of judicial jurisdiction and the recognition and enforcement of certain foreign judgments. As you will have noticed, the discussion of these latter topics bore almost no relation to the issues of choice of law.

The principal feature of the traditional choice of law rules is that they are "jurisdiction selecting". This phrase refers to the fact that they refer whatever question has arisen for decision to the law of a certain jurisdiction as the "governing law". In general, the determination of the governing law was made by considering certain geographical features of the case, the "connecting factor". Sometimes, a single fact was determinative of the choice of law issue, e.g., the situs of land or of movable property, in other cases the inquiry was more complex. The concept of the proper law of the contract referred the court not to one fact, but to several. We saw, for example, a wide variety of geographical fact referred to in The Assunzione (supra, p. 38). The rules for torts, the double-barrelled rule of Phillips v. Eyre (supra,) p. 105) is, of course, highly anomalous. The only important geographical fact in the bulk of torts cases is the place where the plaintiff chooses to sue.

It is apparent from the choice of law rules of the traditional type that they offer a wide variety of decisions for the courts to make. A rule that provides that some question is to be governed by the situs of land offers the possibility of an objective determination of the issue. Land, after all, can only be situated in one place on the earth's surface. A rule that refers to something like the "proper law of the contract" offers some objective features in the sense that such features were listed by the Court of Appeal in The Assunzione, but, as formulated in Etler v. Kertesz, suggests a subjective evaluation of the geographical factors. Which factor, or group of factors is to be given predominant weight? Much the same kind of evaluation has to be made to determine where a person is domiciled. (We will examine this particular question later in the course.)

C. 1. An Alternative Approach. 1. A Re-Introduction...

The principal difficulty in understanding conflicts cases arises from the fact that there is no universally accepted approach to the problems presented by the courts. Here, almost more than in any area of the law, the problems of words and concepts as prisons for judicial thought and as substitutes for analysis loom large. Only when the issues have been reduced to the most basic level of analysis that is possible will any solution be found. It is therefore necessary to set out some very fundamental propositions.

Law is a rational enterprise. This may seem to be nothing but a statement of the obvious. However it is often forgotten and its consequences are interesting and worth exploring in some detail. The first consequence is that every decision made in the context of the law must reflect the inherent demands of rationality. We would be offended if a judge were to decide a torts case by flipping a coin. We might say that to decide the case in this way would be cheaper and likely to be right in enough cases - after all, in some cases the plaintiff wins and in others the defendant does, and by flipping a coin we would create the same situation. We would reject this as an appropriate method because we would regard it as irrational to decide cases in this way. A rational disposition of tort claims may require an examination of fault, intention or the allocation of risk. If we find that any decision is one that depends on irrelevant factors then we may be concerned about how well the judge did his or her job.

There are, of course, limits on how far the process of rationality can be pushed. The achievement of a fully rational system may be frustrated by the fact that the court cannot get adequate access to the facts. Here the court may have to do the best job that it can with the information that it has, and, in examining the court's decision we may be hampered in exactly the same way. We accept this second-best result because the costs of getting the information may be too high, or, at least, too high for the parties to bear. Again there may be cases where a rational analysis leads to a logical impasse. If a court finds that both parents are equally desirous and deserving of the custody of a child, the dispute may only be resolvable by a decision that might as well be made by a flip of the coin. It says something about our belief in the need for rationality that even here a judge would not flip a coin in open court.

The second consequence is that one has to respect the demands of the judicial process if that is the way in which the problems that come up are going to be solved. The judicial process is characterized by the way in which the parties participate. The parties participate in the process under the

common law by having, (a) the chance to present the facts to the court, and (b) the opportunity to present reasoned arguments. Before one can make a reasoned argument one has to know what criteria are likely to be considered by the court. At the same time one has to know what facts are required by the legal rules or principles that are or might be applicable so that the necessary facts, if they exist, can be brought before the court. There is therefore a close relation between the process of judicial decision-making and the requirement of rationality.

The third consequence is that we can talk rationally about the solutions that the law reaches for the problems it has to solve. Law must make sense. Simply, the decision must be justified by reference to non-legal criteria. Much of your time in other courses will have been spent in worrying about such justifications.

What is important in any analysis that we adopt is not that we are always agreed on what the correct result might be or even on the correct criteria to determine the result but that the criteria are explicitly articulated so that they can be examined and considered.

Seen against the theoretical structure, traditional conflicts theory is very unsatisfactory. There is, first,the problem of characterization. Characterization is fundamental to the operation of the traditional rules, yet there is no agreement on how it should be carried out or even over what it is. In terms of the problem presented to a lawyer when a client comes for advice, the process of characterization is, of course both fundamental and essential: the lawyer has to know where to find the law so that the client can be given advice. This process may be as basic as turning to a torts text-book rather than a contracts one, or selecting a particular volume of the Canadian Abridgement or volume of the provincial statutes. We all know that this process works well for what can be termed the paradigm cases: cases or problems clearly fitting in one of the well-recognized categories of the law. At the border of any category, there are serious problems of characterization. In the purely Canadian context, the problems of the interaction of the law of contracts and torts in regard to the measure of damages and the running of the limitation period, are examples of the problems of dividing cases into separate pigeon-holes. In those cases, as you know, there is no certainty and no principled basis for any decision.

These problems arise whenever we try to project onto the facts a distinction that they cannot maintain. It is as if one were to ask, "when does a person become bald or fat?" There are, no easy answers to these questions, even though we know that whether a person is bald or fat is often very clear. If some

important consequences were to depend on the answers to the questions that have just been asked, we would be concerned about the process of answering them. We might want to know why the answer was so important or what the purpose of the inquiry was. So long as nothing important turns on the characterization of a person as bald or fact, the problem of line-drawing does not arise.

Traditional conflicts theory forces us to draw lines even though we are often quite unsure why we are drawing them or why the drawing of a line might be relevant to the dispute. We saw, for example, in Block Bros. v. Mollard, (supra, p. 78) that the result of the case depended on whether the provision of the British Columbia Act was regarded as one of substance or procedure. What has that question got to do with the problem that the court faced? The issue was very simple: should the provisions of the Act be applied to make the contract unenforceable in the particular circumstances of the case? That question required a balancing of the value or social purpose of encouraging the licensing of real estate agents to ensure their competence against the desirability of preventing unjust enrichment. The presence of foreign facts was a set of facts to be considered like any other. To resolve the case by refeence to the process of characterization is an illogical response to the question that the court faced. Similarly, as we shall see, the characterization of the issue in Charron v. Montreal Trust (supra, p. 91) as one of contracts led the court to reach a result that was probably unfair and unjustified.

The absolute necessity for the formal process of characterization under choice of law rules of the traditional type, is the principle fact that calls the whole process into question. It is admitted by most authors, either expressly or implicitly, that the process can lead to results that are not uniform (the forum characterizes a question in one way, the (or a) foreign court would characterize the question differently) and that there is little agreement on how the process is to be conducted.

The doctrine of renvoi (outlined supra, pp. 89,90) is equally illogical and indefensible. We have come across renvoi as a consequence of the traditional rules (using Bondholders v. Manville as an illustration) and as being statutorily approved in the Personal Property Security Act (supra, p. 178). There are two illogical consequences of this doctrine. One is the argument of Morris and Cheshire (supra, p. 90) and now expressed in Dicey and Morris, p. 74, and Cheshire and North, p. 74 that the doctrine is of only limited application. Morris and Cheshire do not argue that renvoi is not logically entailed, only that its

application in every case would be too complex. The question that remains is whether one can maintain such a position without, so to speak, throwing out the baby with the bath-water. Either the doctrine is everywhere justifiable or nowhere justifiable. One simply cannot pick and choose for no good (i.e., principled) reason.

The second problem is that at the same time as the doctrine of renvoi is logically entailed or necessary, it is equally logically insoluble. Either there is an endless oscillation or one side, so to speak, stops the rally, picks up the ball and goes home with it. Why the rally stops at any point is the great mystery. There are two theories: partial renvoi - once over the net and once back when the ball stops (this is the civilian method), or total renvoi - three times over the net when the ball stops. This is all known as the "English" doctrine and is, of course, more sporting than the civilian method. The problem of renvoi is made even more awkward by the fact that uniformity of results (indeed any result at all) can only be achieved if both courts do NOT adopt the same rule. If both courts adopt the same rule, then either no solution is possible (there is an endless rally) or different solutions will be reached. Thus Dicey and Morris state: (10th Ed. p. 79)

> Circulus inextricabilis.--As we have seen, the effect of applying the doctrine of total renvoi is to make the decision turn on whether the foreign court rejects the renvoi doctrine or adopts a theory of single or partial renvoi. But if the foreign court also adopts the doctrine of total renvoi, then logically no solution is possible at all unless either the English or the foreign court abandons its theory, for otherwise a perpetual circulus inextricabilis would be constituted. So far, this difficulty has not yet arisen, because English courts have not yet had occasion to apply their renvoi doctrine to the law of a country which adopts the same doctrine. It is perhaps unlikely that any foreign country will adopt different conflict rules from, but the same renvoi doctrine as, those prevailing in England. Consequently, this difficulty (unlike the first two which have been mentioned) is more academic than practical. Yet the possibility remains, and the circulus inextricabilis cannot (it is submitted) be dismissed as "a (perhaps amusing) quibble." "With all respect to what Maugham J. said in Re Askew," [[1930] 2 Ch. 259] said the Private International Law Committee, [First Report (1954) Curd. 9068, para. 23(3)] "the English judges and the foreign judges would then continue to bow to each other like the officers at Fontenoy." It is hardly an argument for the doctrine of total renvoi that it is workable only if the other country rejects it.

C. 1. An Alternative Approach. 1. A Re-Introduction...

The claim of this part of the materials is that traditional conflicts doctrine is fundamentally incapable of faithfulness to the demands of the process of adjudication and, hence, to the requirements of justice. This statement is a strong criticism of the traditional rules. It is based on the following argument. If the process of characterization is carried on in a result-selective way, then any possibility that the law may develop as a system of reasoned elaboration of rules is denied. If a judge reaches a conclusion in a case by characterizing an issue as one of contract and not tort or as an issue of matrimonial law and not testamentary law, and if no reasons are given for this conclusion, the process of adjudication is seriously compromised. There are no understood or agreed standards or principles that permit the parties to know what facts are likely to be relevant (that is, that are likely to move the judge to decide one way or another) and, simultaneously, of course, no basis to support a reasoned argument. It is not a reasoned argument for counsel to say, "I submit, my Lord, that my client should win." Similarly, it is not a reasoned argument to say, "I submit, my Lord, that this is a contracts case and not a torts case", and to add in response to the question, "Why?", "Because if it is a contracts case, my clients wins". Exactly the same criticism can be made of the doctrine of renvoi. To argue that it is too complicated to apply the doctrine in contracts is not an adequate answer to the question of the doctrine's scope, unless a reasoned justification can be found for arguing that contracts cases require simpler rules than, say, personal property security cases. Carried to its conclusion such an argument would suggest that contracts cases be decided by flipping a coin. If we reject this method as undercutting the demand for rational and reasoned decision making, how can we pick an arbitrary point at which to stop our investigation of the rules we have determined are relevant?

The contagion that is carried by these compromises and refusals to talk openly about what is at issue has been carried to every part of the traditional conflicts doctrine. If we can defend result-selectivity in characterization, we can defend it in determinations of the proper law of the contract. It is, therefore, regarded as permissible to choose the proper law with an eye on the result that the choice will lead to. Since the reason for the choice must be hidden - the test for the proper law refers only to the law of that jurisdiction that has the closest and most real connection with the contract - once again no reasoned argument is possible, nor are counsel given any guidance on what facts might be relevant.

The following statement openly endorses result-selective characterization and the use of devices like renvoi to reach

desired results. Castel, Conflict of Laws, Cases, Notes and Materials, 5th Ed. 1984, pp. 1-15:

> ... Canadian courts should not feel ashamed to use the traditional method of jurisdiction-selecting rules to solve conflict of laws cases. The centuries old process has resisted many assaults and on the whole, proved quite successful. To say that the courts choose a law without considering how that choice will affect the controversy is not accurate. The lawyer representing one side or the other in a case characterizes ... the problem in such a way that it will, by virtue of the relevant conflict of laws rules, ultimately call for the application of a law supporting his client's contention. Obviously, he has examined the contents of the potentially applicable laws. If the court feels that it would lead to an unjust result to apply the law called for by the suggested characterization, it will reject such characterization, or use other techniques such as renvoi, public policy, and so on in order to apply a different law and reach a different result. As will be noted, characterization is not a purely mechanical process. If more than one characterization is available for a set of facts, the choice between the characterizations may turn upon the court's desire to achieve justice in the particular case or preference for one rule of law over another.
>
> Under the traditional approach the court is able to concern itself with the contents of the foreign laws among which it has to choose and of the policies behind them before selecting the one state whose law will be applied, even though the court does not frame its opinion in those terms. In practice, the courts do not proceed independently of the law's contents which are to be discovered at a later stage of the inquiry. Since in most jurisdictions the foreign law must be alleged in the pleadings, this gives the court an indication of the laws which will be relied upon by the parties.

These charges that are made against the traditional rules are serious. If they can be sustained they indicate that that theory or conceptual structure is not just wrong in point of detail (as, for example, some of the tinkering with the tort rules in Chaplin v. Boys might indicate) but fundamentally inadequate. At best, the traditional theory permits the achievement of the correct result in a case quite by chance, at worst, traditional theory seriously undercuts or threatens the values that any legal system must seek to forward. These charges and claims will be addressed in a moment.

One important point must first be noted. Rules of law are much more complex than they seem at first sight. It would be

incorrect to state that, for example, in the common law consideration is always required for a valid contract, or that the Statute of Frauds really means what it says. A correct statement of the law of Ontario, British Columbia, Nova Scotia or any other province on any issue is very complex. You must, therefore, be aware of the dangers of treating a simple statement of some foreign law as an accurate statement of that law. There is no reason to assume (and abundant evidence to the contrary) that foreign law can be any more simply stated than our own.

This difficulty is an inescapble aspect of conflicts cases. We avoid the worst problems by focussing almost exclusively on conflicts cases that arise between jurisdictions roughly similar to our own. Even then, there is a wide range of differences between the rules (and underlying legal concepts) in conflicts. Von Mehren and Trautman, The Law of Multistate Problems, p. 84; say:

> Before analyzing the choice-of-law process, we need to reflect briefly onthe prerequisites and possible limits to its effective functioning. Are there areas of law in which it is not possible, or at least highly impractical, for the forum to handle litigation under rules and principles different from those applicable to a fully domestic matter? If so, what are the characteristics of these areas and what implications do these characteristics have for areas in which choice of law does function?
>
> To begin with, a forum undertaking to handle a matter to which domestic rules may not apply ordinarily faces increased difficulties of two sorts: First, the forum may ultimately be required to understand and apply unfamiliar rules and principles; second, the forum in any event must consider the choice-of-law problem, and ineluctably another dimension is added to its inquiry even if the ultimate conclusion is that domestic rules and principles apply. Litigation involving significant non-domestic elements thus often presents a comparative-law problem and inevitably carries with it a choice-of-law problem. Each of these problems may be of considerable intellectual difficulty, and the former can also involve real dangers of misunderstanding and misapplication of the relevant nondomestic rules and principles.

It is necessary to dispose of some preliminary arguments. One claim that is made for the traditional theory is that it provides for uniform results regardless of where a case may be litigated. This claim is expressly made by Castel, Canadian Conflict of Laws, Vol. 1, p. 10, where he says:

> The rules of conflict of laws must be such that they will prevent the decision from depending on the fortuitous place of trial. Forum shopping must be discouraged.
>
> Predictability and uniformity of results are especially important in areas where the parties are able to give advance thought to the legal consequences of their acts.

and implicitly made by Dicey and Morris and Cheshire and North in their respective discussions of the functions of Conflicts analysis. It is important to notice that, even on the traditional theories' own terms, the claim that it contributes to uniformity is not only false but illogical. It is false insofar as traditional forum centered rules like Phillips v. Eyre exist. It is likely false in many cases where the manipulation of illogical or open-ended concepts like characterization or the proper law of the contract is permitted. It is an illogical claim insofar as there can be no universally agreed basis for solving rhe problem of characterization and in that a common approach to the problems of renvoi (both jurisdictions accept either total or partial renvoi) precludes either jurisdiction from reaching the same result as the other.

If the claim that traditional theory contributes to or ensures uniformity of results is shown to be false by the existence fairly exotic examples of conflicts reasoning, can the theory be supported on other grounds? Morris, The Conflict of Laws 2nd Ed. p. 9 says: "In any given case the choice of law depends ultimately on consideration of reason, convenience and utility - e.g., how will the proposed choice of law work in practice, not only in this case, but also in similar cases in which a similar choice may reasonably be made?" Castel, Canadian Conflict of Laws, Vol. 1, for example, in a section entitled "Objectives - Policies - Choice Influencing Considerations" (pp. 7-11) lists the following objectives (pp. 9-11):

> I. Co-ordination of Legal Systems: Relevant Policies of Interested Legal Units
>
> It is usually said that one of the objectives of conflict of laws is to co-ordinate the incidence of the legal systems of the world and thus to further harmonious relations and co-existence among legal units. To do so, the rules of conflict of laws must take into consideration the relevant policies of these legal units. This is very important when the legal units involved belong to the same political unit as in the case of a federal state. The legislature and the courts of a particular legal unit must have respect for the legitimate needs and interests of other legal units and co-operate with them in furthering these needs and interests. Only in this way will the demands of interprovincial

and international commerce be fulfilled. This approach does not mean that the legislature or the courts should ignore their own relevant policies, needs and interests.

In the absence of a formulated rule of conflict of laws applicable to the particular issue, the court, after appraising the relative interests of all the legal units involved in the determination of that issue, should apply the law of the territorial unit of dominant interest. For instance, in the case of a transfer of an interest in land, it is normal to apply the law of the territorial unit where this land is situated.

2. Justice of the End Result

The desire to do justice in cases involving legally relevant foreign elements is often advanced as the most important objective of any system of conflict of laws. Thus it is said that a legislature or a court cannot do justice if it refuses to recognize the existence of foreign law or rights acquired by virtue of that law or denies validity to a foreign judgment. Also the conflict of laws rules adopted by the legislature or the courts must be the expression of the local concepts of justice as applied to problems of private international intercourse. Furthermore, in the individual case, the court must ask itself what are the demands of justice in order to achieve justice of the end result. The search for justice is a very important element in the development of a coherent system of conflict of laws in territorial units like those of Canada where principles and rules of conflicts are largely the work of the courts. This search for justice will often bring about a change in the conflicts rules as local concepts of justice vary with the passage of time. The application of the domestic law as the better rule of law is, in terms of socio-economic jurisprudential standards, another example of the search for justice.

3. Protection of Justified Expectations

An objective which is closely associated with that of justice is the protection of the justified or reasonable expectations of the parties. This is an important objective in the conflict of laws but it is necessarily limited to situations where such expectations deserve satisfaction. In this connection, the nature or location of the transaction will play a significant role. For instance, in the contractual field, the parties, subject to certain limitations, are free to choose the law to govern their contract.

Protection of the justified expectations of the parties is also achieved if the results are predictable in advance.

4. Predictability and Uniformity of Results or of Legal Consequences

The rules of conflict of laws must be such that they will prevent the decision from depending on the fortuitous place of trial. Forum shopping must be discouraged.

Predictability and uniformity of results are especially important in areas where the parties are able to give advance thought to the legal consequences of their acts. Uniformity of results is also important in the field of succession to interests in movables. Since it would be unreasonable to have each of these interests governed by a different law, the courts have adopted the rule that such succession is governed by the last domicile of the deceased. Predictability gives security to the parties.

5. Convenience, Simplicity, Ease in the Determination and Application of the Law to be Applied

Conflict of laws rules should be simple and easy to apply; they should facilitate the judicial task. Preference for the law of the forum simplifies the judicial task. For instance, it is more convenient for a court to apply its own rules of procedure than foreign rules. Simplification of the judicial task is not the whole end of a system of conflict of laws, and opposing considerations may outweigh it.

In a more specific context, Castel says: (Canadian Conflict of Laws, Vol. 2, p. 514)

> In the field of contracts, the best way to develop international trade and be responsive to social commitments is to adopt conflict of laws rules that promote the doctrine of freedom of contract or party autonomy and protect the justifiable expectations of the contracting parties. In this way certainty, predictability and uniformity of results can be achieved. This means that the parties should be able, within certain limitations, to determine which law governs issues involving the validity of their contract and the nature of their obligations, so as to foretell with accuracy what will be their rights and liabilities under the contract in case of its breach.

He regards this as an adequate justification for the traditional rule. The issue can now be fairly carefully drawn: To what extent are the conflicts rules in contracts likely or appropriate to achieve "certainty, predictability and uniformity of results"?

3. WHERE DO WE GO FROM HERE?

The need to develop a more useful approach to conflicts arises in every area of the law. Marriage and divorce, torts, etc., all have special problems that arise from the peculiar domestic features of those areas of the law. If the criticisms of the traditional approach to conflicts are valid in contracts they are equally valid in any other area of the law. It must be emphasized that it is not the argument of this part that certainty, predictability and uniformity are either irrelevant or unimportant. These goals are of primary importance. Our task now is to see how they can best be achieved, and, in certain cases, how these values may have to be ranked if the achievement of one can only be made at the expense of another. One of the most important lessons to be learned from conflicts cases is that the achievement of these values is a difficult and complex task. Success will only be gained if we are very careful about a large number of important issues.

First, the notion of certainty in the law is a very complex idea. Certainty in contracts is not the same as certainty in torts or in property. Sometimes we need certainty to plan our affairs, at other times we need certainty in making a settlement only after something has gone wrong. The verbal formulation of propositions that achieve certainty in these two respects can differ as much as the Rule in Shelley's Case (1580), 1 Co. Rep. 93b, and the principle in Donoghue v. Stevenson, [1932] A.C. 562. It is naive to think that certainty comes from black-letter rules: it may, but equally, it may not.

In a similar manner, it can be shown that the notions of predictability and uniformity are also very complex. Uniformity presumably involves the similar treatment of similar cases. However, to know which cases are similar is only to know the whole of the law. Crude ideas of similarity are as dangerous as crude ideas of certainty. Those who use the verbal formula that the law should seek to achieve certainty, predictability and uniformity often believe that simply making that statement justifies any form of legal reasoning or analysis.

The second aspect to this argument is that discussions of this kind ultimately come down to a difference in legal philosophy. Everyone who thinks about the law and how to resolve a concrete problem that might come before a judge must eventually face the question of what the law's response should be to issues like the scope of judicial discretion and the relevance of social values. Traditional Anglo-Canadian conflicts doctrine has

adopted one set of answers to these issues. There are other approaches that adopt radically different approaches. It is not suggested that one approach is wholly right or that one is completely wrong. One approach may, however, be better able to achieve certain values than the other. The question of which one should be adopted may be a matter of what one wants to achieve. What is suggested as being defective in the traditional approach to the choice of law problem is that it is an approach that seeks, and can seek to achieve only the values of historical continuity and simplification of the judicial task. Historical continuity is, at best, a dubious value for the law to seek, and simplification of the judicial task cannot be other than a minor value.

The tragedy of the choice that is made by those who advocate the traditional rules is that it is an unconscious choice. It is necessary to spell out explicitly the reasons for the choice, the alternatives to it and the consequences of the choice that is made. The tragedy is compounded when the traditional analysis of conflicts is offered, and those who support such an approach assume that some very important social values will be achieved without indicating what those values are or how they might be achieved.

If the traditional rules are inadequate, where do we go from here? First, we must be specific about what is objectionable about the rules we now have. Some objections have already been made: can these be usefully generalized? The principal objection to the traditional rules is that they force us to make a choice between jurisdictions, between the law of Austria or the law of Switzerland, between the law of Ontario or Cuba. When we choose in this way we not only are required to ignore the content of the individual rules by the form or structure of the traditional rules, we run the serious risk that we will actually believe that we can do so. We may believe that we can peek at the content and then make a "result-selective" choice. It is true that the expert witness called to prove the foreign law may say that, for example, an invalidating rule may not apply to the contract we are concerned with. It is the failure to approach the cases as <u>contracts</u> cases that is the ultimate source of our problems. The courts do not, and are not encouraged by the rules to look at the basic contracts issues or the purposes of the law of contracts. When we look below the surface what is significant about the law of contracts is the existence of a common underlying set of values in the law of every developed western society. We can see these shared values if we say that generally the courts approach a contracts problem by asking if there is any good reason not to enforce a contract. (Of course, the accuracy of this statement may be compromised by a large number of

reported cases on consideration, the rules of offer and acceptance, exemption clauses and illegality, a large number of which cannot be easily reconciled with each other, but those cases are pathological: they do not, and cannot represent main-stream contracts problems in the commercial area.) Any reasoning process that suggests we are indifferent to whether we enforce or refuse to enforce a contract is automatically suspect.

One response to this kind of concern has been to say that we apply that system of law that will validate the contract. Porter, C.J.O., in Etler v. Kertesz refers to an argument that, as between two laws, one of which would make the contract valid and one of which would make it invalid, the court should choose the law that would validate the contract (supra, p. 19).

Castel: Canadian Conflict of Laws, Vol. 2, p. 531 says:

> Again, the place of contracting, the place of performance and so on, cannot be considered in the abstract or simply as factual connections divorced from other considerations. The policies of the states or provinces where these places are located must be analysed and compared with the forum's policies, as they will influence the courts in selecting the system of law that has the most real and substantial connection with the transaction and the parties. For instance, in the absence of countervailing considerations, when two states or provinces substantially connected with the transactions and parties have an approximately equal interest in the determination of a particular issue but the domestic law of one state or province would validate the contract and the domestic law of the other state or province would invalidate it, the court should apply the law of the first state or province as the proper law of the contract if it corresponds with the policy of lex fori. This is one way to protect the justified expectations of the parties.

Once again, the concession made in the interests of apparent contracts values is first, a fatal concession if one wants to maintain the traditional rule, and second, a naive response to the contracts issues. It is a fatal concession because it suggests that choices of law rules are purpose oriented. They cannot be so long as they are phrased like the traditional contracts rule which focusses only on the geographical contacts of the contract to the jurisdictions involved. The issue can be fudged by saying that, of course, the parties "intended" to have a valid contract, but this is simply a meaningless thing to say. What the parties intended, expected or wanted is, as we have seen, irrelevant in cases like Etler v. Kertesz or Ross v. McMullen. To say that they intended a valid contract in Imperial Life v. Colmenares or Arnoldson v. Confederation Life

invites the response, "So what? They got one." The only area of contract in Canadian law where we can give effect to the existence of a pressure to hold people to their bargains is in cases of indefiniteness and some of the potentially irrational problems with consideration - areas like the problem of the variation of contracts, the problem of "going-transaction adjustments", promissory estoppel and the third party beneficiary rule. The principle has no operation in interpretation (except insofar as we give effect to what the parties expected), frustration or unconscionability (except in the sense that existence of unfairness may be a reason to deny enforcement).

We have to remember that no legal system enforces all contracts, so we cannot avoid focussing on why the jurisdiction that does invalidate did what it did. Thus, if we applied the lex validatis (everything has a latin tag in Conflicts) in Ross v. McMullen would that be any more sensible? The answer must be no. Both Ontario and Alberta have nearly identical legislation on real estate agents and both make the contracts of unlicensed agents unenforceable. Why then should we validate the contract? There is a good reason that we should not enforce: the social policy of discouraging unlicensed agents from preying on the public. (I leave out of consideration the argument that non-enforcement of promises may be uncalled for in the general context of controlling unqualified practitioners of various kinds. See, Monticchio v. Torcema Construction Ltd. (1979), 26 O.R. (2d) 305.)

(It should be noted that the confidence one might have in the obviousness of the correct result in Ross v. McMullen is lessened by the recent cases like Block Bros. Realty Ltd. v. Mollard and Greenshields Inc. v. Johnston (mentioned in a note, supra, p. 50). But, of course, there the courts, even though they were the courts of the jurisdiction that had the invalidating rule, got hopelessly bogged down in the traditional choice of law process and forgot what they were supposed to do in the first place. These cases, if we try to give them a sensible justification, can be seen as merely cases where the court saw no strong value in striking down the contracts even though they might have come under the legislation. On this basis these cases are authority against Etler v. Kertesz and Bondholders v. Manville.)

In the Anglo-Canadian tradition there has been very little concern expressed over the choice of law rule in contracts. Its very open-endedness and vagueness is often regarded as part of its strength and virtue. This attitude is fundamentally opposed to any concern that we should develop a principled approach - an

approach that is committed to the need to develop predictively useful rules. Any result can be reached in any case where the court uses choice of law rules of the proper law of the contract type, and no one can be certain in advance what result will be reached.

We can start our examination of alternative ways of dealing with conflicts problems by looking at the development of choice of law rules in American law.

Notes and Questions

1. The language and the approach adopted by the Oregon Court suggests that it has very different concerns from that of the Canadian and English judgments that we have read. Whether or not we agree with the result is, from an analytical point of view, less important than is the fact that we can debate the issues and discuss the relative strengths of the policies of California and Oregon. Had this case come up for decision in Canada, the court would, of course, have reached the same result as either the majority or the dissent by making an appropriate finding of what the proper law of the contract was. Such an analysis quite simply could not lead to the development of predictively useful rules. "Counting contacts" or determining which law "has the closest and most real connection" with the transaction is both formally and practically unconcerned with the result that the application of either rule would achieve.

2. It is clear from the dissenting judgment that a California court would have a good reason for reaching a different result. It is in this way that Lilienthal v. kaufman is a very much more difficult case than, say, Bondholders v. Manville. That case was, as we saw, regarded as a "false conflict". That meant that there was no need to choose between Saskatchewan law and Florida law because both would (or should) reach the same result - the enforceability of the contract. There are a number of ways of phrasing what is referred to as a "false conflict", and it is important to be precise what we mean. One way is to say that the purpose of both rules would be served by a single result. Thus, again using the Bondholders v. Manville facts, both Saskatchewan and Florida share the same value of holding people to the bargains that they have made. Florida subordinates this value to a special one in favour of married women, but, on the assumption that this policy refers only to Florida married women, it is inapplicable on the facts of this case. (We have to ignore the existence of reasons based on the possible unfairness of the contract for not enforcing it.)

Another way of describing a "false conflict" is to say that a Florida court faced with this geographically complex case would not apply its invalidating rule. We might be indifferent to the reasons that a Florida court might do so, but the effect of such evidence of what a Florida court might do would be to remove any possible reason from the Saskatchewan court to invalidate. This result follows because in contracts we enforce unless there is some good reason not to.

The difference in these two formulations is that in the first we are focussing on the fact that a particular result forwards certain purposes and that these purposes are shared by both jurisdictions concerned. In the second formulation, we

might be tempted (as, for example, in Castel, Canadian Conflict of Laws, Vol. 1, p. 548 n. 172) to indulge in such exotic forms of reasoning as renvoi and, in the context of Bondholders v. Manville, to regard the Florida court's reference, say, to the law of the domicile as a renvoi to Saskatchewan. This method is not satisfactory unless, as is difficult, we can believe that a jurisdiction-selecting rule of the type now being attributed to Florida law expresses any social policy of any kind.

3. The importance of these issues can be seen in Lilienthal v. Kaufman. This case is a "true conflict" because the purpose of both rules would be served by their application to the case. The purpose of the Oregon law is to protect the family of the person who would spend whatever should be kept for the family's support, and to prevent the family's becoming a public charge. California, we may assume, is indifferent to the fate of the Oregon family, but cares very much that contracts be generally enforced. If these are the purposes of the different laws then we can rationally defend either result. Notice that the judgment of the dissent does not deny the purpose of the Oregon law: it only says that, in a geographically complex case, the purpose is not so strong as to justify its application to limit the general and shared value in enforcing contracts. On this basis the case becomes a "false conflict". The Oregon purpose is to be subordinated to another. Neither judgment in the Oregon Supreme Court is unconcerned about the need to balance the competing values: neither is playing around with jurisdiction-selecting rules.

4. A true conflict of the Lilienthal type is regarded by many conflicts scholars as the ultimate test of any theory and the Gordian Knot that must, somehow be untangled. Underlying most of the responses, including those of the Restatement, is the idea that the presence of a true conflict will lead to different results depending on where the case is litigated. This kind of result is frequently denounced as leading to forum-shopping and is therefore said to be a "bad thing", and one to be discouraged. The simple faith of Restatement, Second is that both courts will agree on the result reached by the kind of analysis envisaged by 6, 188. Similarly Weintraub would, presumably, support the dissent, as the Oregon rule would not meet the test set out in his first proviso.

5. A more ambitious attempt to resolve true conflicts - no one has any problem with false conflicts - is offered by Cavers, The Choice of Law Process, 1965. He offers what he terms "Principles of Preference". The ones applicable to contracts cases are the following:

[1] Where, for the purpose of providing protection from the adverse consequences of incompetence, heedlessness, ignorance, or unequal bargaining power, the law of a State has imposed restrictions on the power to contract or to convey or encumber property, its protective provisions should be applied against a party to the restricted transaction where (a) the person protected has a home in the State (if the law's purpose were to protect the person) and (b) the affected transaction or protected property interest were centred there or, (c) if it were not, this was due to facts that were fortuitous or had been manipulated to evade the protective law. Page 181.

[2] If the express (or reasonably inferable) intention of the parties to a transaction involving two or more states is that the law of a particular state which is reasonably related to the transaction should be applied to it, the law of that state should be applied if it allows the transaction to be carried out, even though neither party has a home in the state and the transaction is not centered there. However, this principle does not apply if the transaction runs counter to any protective law that the preceding Principle would render applicable or if the transaction includes a conveyance of land and the mode of conveyance or the interests created run counter to applicable mandatory rules of the situs of the land. This Principle does not govern the legal effect of the transaction on third parties with independent interest. Page 194.

It is worth summarizing at this point some of the features of these alternative approaches. At the same time we can examine how well they respond to the problems that have to be faced.

We need an approach to conflicts problems that permits us to choose sensibly between the competing rules. Once we reject the jurisdiction-selecting approach of the Canadian and English cases we find that there are two features that distinguish the newer approaches. The first is that of the Restatement, Second. Here the combined effect of 6 and 188 is a list of factors that the court must consider in any contracts case. There is a superficial similarity to the approach of the English Court of Appeal in The Assunzione, (supra p. 38). However the crucial difference lies in the fact that under the approach of the Restatement it would not be possible not to know what the issue was. The Restatement approach does not, therefore, identify a "governing law": it refers to an "issue in contract". However, the Restatement does not indicate what approach should govern any particular issue. The Restatement does not suggest that, for

example, the issue of validity does not present the same issues as frustration or damages.

In contrast, the approaches of Cavers and Weintraub start from the position that there must be some good reason not to enforce a contract. But, as we have seen, a focus on validity cannot solve all the issues that can come up. In fairness to both Cavers and Weintraub, they do not suggest that their approach does offer any direct answer to those other problems. They are sympathetic to the solution of that problem by means that reflect the underlying contractual concerns.

Almost every American writer who has discussed the contracts aspects of conflicts has taken the position that the approach of the first Restatement is impossible. They all agree that some different approach must be found. Unfortunately they do not all agree on what should be done. We shall explore the significance of the disagreements later. As a practical matter, the general approach of all courts (Canadian, American, and English) to contracts is sufficiently uniform and sufficiently based on the fairly clearly perceived principle that bargains should be enforced absent good reason to the contrary, that there will be a high incidence of agreement on the resolution of contractual disputes involving geographically complex facts. The real tragedy of our continued adherence to the traditional approach is that this fact is obscured. Conflicts issues in contracts cases are, often, relatively simple; much more difficult problems occur once we move into other areas of law.

Note however that the existence of a common policy of upholding bargains will not always provide an easy solution, though recognition of that policy is a most useful starting point in analysing choice of law problems in the contracts area. W.L.M. Reese, the Reporter for the Restatement, Second, in "Choice of Law in Torts and Contracts and Directions for the Future" (1977), 16 Col. J. of Transnational L. 1, discusses situations in which the basic policy is overridden by the law of one interested state yet adhered to by the law of another. He states the basic problem as follows: (at pp. 26, 33)

> When the issue is one of validity, there will be a natural tendency for the court to seek to apply the law of a state that will uphold the contract. By so doing, the court will be furthering the basic policy of contract law which is to protect the expectations of the parties. On the other hand, all states have rules that invalidate contracts under certain circumstances, frequently for the purpose of protecting the weak against the strong. A major difficulty is in identifying those situations where the policy

> favouring protection of the expectations of the parties should be outweighed by the interest of a state with an invalidating rule in having this rule applied.

If we pause for a moment to consider the problems of uniformity more carefully, the problems can be transformed. Is uniformity really desirable or necessary? The international legal order and every federal system have to accommodate the right of states and, in the Canadian context, provinces, to make value judgments appropriate for themselves. Diversity is a fact in the world and among Canadian provinces. The purpose of a federal system is, after all, to permit each constituent part to make its own decisions on matters within its jurisdiction. Suppose that the Lilienthal facts arose in the Canadian context between Ontario and Quebec. We can assume that Quebec is equivalent to Oregon in having the rule that would cut down the enforcement of contracts. Suppose also that a similar case (Quebec defendant, Ontario plaintiff) comes before an Ontario court. The Ontario court rejects the conclusion of the Quebec court and enforces the contract. (We can ignore for the moment any problem of collecting the amount of the judgment). Assume also that the case culminates in the Quebec courts with a judgment roughly along the lines of that of the majority in Lilienthal (closely balanced case, but ultimately must support legislative policy of forum) in the Quebec Court of Appeal. At the same time the similar case in Ontario culminates in a judgment of the Ontario Court of Appeal roughly along the lines of the dissent in Lilienthal (closely balanced case, but the general policy of upholding contracts should prevail).

diff forums should be able to apply their own policy in true conflicts cases

Both of these cases are appealed to the Supreme Court of Canada. What options does that court have? It has two choices, it can dismiss both appeals, or it can allow one. If it dismisses both it could say something like this:

> We believe that these cases raise matters that are only of concern to each province. These matters, moreover, fall into that class of matters that are within the exclusive jurisdiction of the provinces. We see no reason why we should review the decision of either Court of Appeal to impose a single standard for the handling of such problems as these cases present. Both courts have behaved responsibly in the context of the Canadian federal system in treating carefully and sympathetically the legislation and social policy of the other and nothing more can be expected. Neither court made any unreasonable assertion of jurisdiction so as to prejudice unfairly the resident of the other province.

eg true conflicts case

Out ct - applies its policy

Que ct - applies its policy

Both Appealed to SCC

SCC should uphold diversity & cts, legal act responsibly constitutionally

Alternatively, it could say something like this:

> We think that uniformity in Canada is a goal to be sought and that so far as possible this court should encourage it. Since, ex hypothesi both of these cases involve more than the interests of one province, it falls to this court to make the determination of that value that can be regarded as a transcendent national value. Accordingly, in our opinion we choose to apply the value represented by the law of ....

Is there a third alternative? If not, then we are forced to conclude, either that uniformity is not particularly important and diversity is one of the consequences of a federal system, or that uniformity will be obtained by the development of national values, the development, in other words, of a federal "common law". In either of these situations, the solution is reached by the application of what can only be regarded as constitutional values. Uniformity as such is either irrelevant because, from a constitutional point of view, diversity is acceptable, or imposed by the decision of the Supreme Court that one provincial value is better than another (or possibly, that both are to be subordinated to some "federal" value). This analysis seems to transform the traditional conflicts problem and inquiry.

Writing on the constitutional problem of uniformity and diversity is very sparse. The following are the principal sources:

Willis, "Securing Uniformity of Law in a Federal System - Canada" (1944), 5 U.T.L.J. 352.

Abel, "The Role of the Supreme Court on Private Law Cases" (1965), 4 Alta. L. Rev. 39.

Russell, "The Jurisdiction of the Supreme Court of Canada: Present Policies and a Programme for Reform" (1968), 6 Osgoode Hall L.J. 1.

Hertz, "`Interprovincial', The Constitution and The Conflict of Laws." (1976), 26 U.T.L.J. 84.

Hertz, "The Constitution and the Conflict of Laws: Approaches in Canadian and American Law." (1977), 27 U.T.L.J. 1.

The American solution to this problem, which we shall examine in more detail later, is characterized by the fact that the Supreme Court cannot review State court determinations of

US SCt

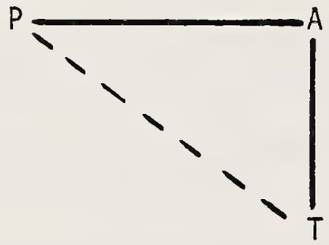
State law. That court, unlike the Canadian Supreme Court, has no power to impose uniformity, all it can do is to force each court to behave responsibly. We shall investigate later what behaviour is or is not responsible.

We shall, however, make a short digression into the law of Agency to explore some problems that will add to our analytical vocabulary.

III. AGENCY

The purpose of our examination of the issues and cases in this section is to review the process of resolving conflicts problems by the traditional methods and to develop some of the alternatives that we have been discussing. The problems of the law of Agency are particularly well suited for this purpose because they are simultaneously simply stated but very difficult to resolve. The principal reason for this fact is that Agency problems involve more than the two parties to a contract: they are problems of three persons, very often of the type where one of the two litigating parties must suffer for the misdeeds of a third person. This feature of the law of Agency provided a useful bridge between the problem of contracts (which are usually fairly straightforward) and the problems of torts (which are much more difficult).

The problems of agency in the conflict of laws are not often discussed. However, the cases and problems are interesting because the principles of agency are only partly determined by contract. Keep these other principles in mind as you read the cases. The general agency relation looks like this:



In both the common law and the civil law systems, if the agency relationship is disclosed and the identity of the principal (P) is known to the third party (T), T may not assert rights of set-off or defences as between himself and the agent (A) in a suit brought by P against T. For example, if a salesperson, A, acting as agent for a department store, P, sells a refrigerator to T, P may sue T for the price of refrigerator. In this situation, T clearly knew of the existence of the agency relationship, and knew the identity of P. Thus if A personally owed T $100, T would not be allowed to reduce P's recovery by that amount. The rationale for this rule would seem to lie in the sense that T was fully aware of the fact that he was dealing with P, albeit through A. Obligations owed to T by A personally

could not then reasonably be considered by T as appropriate to reduce his liability to P.

The common law and the civil law systems also agree that if T does not know that an agency relationship between P and A exists, T is entitled to treat A as a P. That is, when sued by P, T can assert as against P any rights of set-off or defences that he would have had as against A were he being sued by A. To elaborate, we are now discussing the situation of an A who, acting in his own name, sells goods to T without disclosing the fact that an agency relationship exists (i.e. that A is transacting on behalf of another.) If T does not fulfill his part of the contract of sale of such goods, he may be sued by P. In this situation, any rights of set-off or defences which T would have had against A had he been sued directly by A will be available to T as defendant in the suit by P. Clearly this rule operates in T's favour, probably because of the sense that it would be unfair to increase T's liability because of an agency relationship of which he was unaware.

The common law and the civil law, however, differ where the fact that an agency relationship exists is disclosed (i.e. T knows A is an A for someone) but the identity of P is not disclosed. In this situation the common law protects P's, by requiring T to treat A as an A. He cannot assert rights of set-off as between himself and A in a suit by P against T. The civil law, on the other hand, protects T's. T can assert a right of set-off stemming from a transaction solely between himself and A as long as he did not know, at the time of the transaction on which P's suit is based, the identity of P.

The theory of the common law is that once T knows that he is dealing with an agent, he assumes the risk of full liability to P in regard to the transaction which A is conducting with T on behalf of P. T does not enter the transaction with the expectation that any obligations owing to him by A will mitigate his obligations to P. The theory of the civil law is that if P chooses to hide his identity, he assumes the risk of having his recovery reduced because of collateral dealings between A and T. The civil law, then, favours T's, while the common law favours P's. On this point, neither rule is capricious; both make sense within their separate legal contexts. Neither embodies absolute and perfect justice. Both are workable and sensible rules, providing a background against which A's, P's and T's can order their affairs, and accept or decline risks.

The next case raises the problem of the agency relationship where the identities of all the parties have not been fully disclosed. Bearing in mind the possible reasons for the rules in each legal system, how well does the judgment deal with the different reasons for different results under each legal system?

one hand, it is not right to pay one man's debts out of another man's money, which is what the defendants are seeking to do. On the other hand, it is not right to avail one's-self of another man's credit and connection, and not comply with the conditions on which that credit and connection rest, and this is what the plaintiffs are seeking to do. The plaintiffs, however, never led the defendants to believe that the goods were Demestre & Co.'s, for, although the bills of lading were in their name, the letter which accompanied the bills of lading informed the defendants that the goods were not Demestre & Co.'s, and were to be insured for the interesado. For the reasons above given, the plaintiffs appear to us to be entitled to recover 11,000, subject to the deductions which they themselves concede ought to be made.

Judgment for the plaintiffs.

[The judgment of the Court of Appeal was affirmed by the House of Lords, (1883) 8 App. Cas. 874, on grounds that did not involve the issue discussed by the Court of Appeal.]

Notes and Questions

1. The dispute here is between P and T. A has gone bankrupt and the issue then is which must bear the loss which A's insolvency has caused. On which party does Spanish law put the risk of A's insolency? On which party does English law put this risk? What do the answers to these questions say about the way in which this case should be decided? What do you think should happen if there were a Spanish third party and an English principal? true conflicts – forum prioritized in applying its policy

2. It might be considered that the above analysis (viz. that the rules involved are meant to protect only people located in a particular geographic place) begs the question of the purpose of the rules. Moreover, one might question whether the idea that losses should not be shifted absent good reason to do so fully copes with the complexity of the relationship between two innocent parties, T and P. Under orthodox tort theory, this idea makes sense: where losses are shifted because of the negligence of the defendant, and such negligence is not proven, there is no reason to shift the loss from plaintiff to defendant. (As an aside, it might be thought that contemporary tort law has strayed a good deal from this theory, whether tacitly or expressly. Recent developments in the field of torts complicate the field of tort-conflicts, of which more later.) In Maspons v. Mildred, two parties are contracting against the differing backgrounds of two systems of law. Each of those systems would allocate the loss. To throw up one's hands and conclude that neither legal system is

Spanish law protects Eng TP
Eng law protects Spanish P
law: Neither purpose forwarded by applic b/c rules not meant to protect foreigners unless ptfs K'ed w part. - cular law in mind.
Here ptfs had no expectations / risk of this loss not advert to

relevant may be to sidestep a problem which each of the legal systems clearly saw as a problem with which it must cope.

If one were to consider the Maspons v. Mildred case as occurring in a legal vacuum, i.e. absent rules and legal backdrops, arguments could be made for either party bearing the loss, for letting it lie, or for splitting it. However, the existence of a legal backdrop can provide convincing reason why one or the other of the parties should bear the loss. That is, the rules that each of the common law and civil law systems have formulated are not inherently fair; rather, they conduce to fairness, in the sense that they allow parties operating within legal contexts to order their affairs accordingly, so that losses are not left to fall capriciously. The common law does so via a rule favouring principals. The civil law does so via a rule favouring third parties. Where P is in a civil law jurisdiction and T is in a common law jurisdiction, both rules break down, absent evidence that both parties intentionally contracted against one or the other of the two legal backgrounds.

No such evidence is present in Maspons v. Mildred. We can then either assume that T contracted against the background of English law and P against the background of Cuban law, or that they contracted against an international background, which is to say a background of no rules. Under either analysis, neither party could reasonably expect protection. Indeed under the first analysis, both parties could expect to lose.

Given this view of the parties' expectations, there is no reason to apply either English or Cuban rules. Neither are based on inherent fairness. Both purport to order relationships, and neither succeeds in doing that in this case.

At this juncture in our reasoning process, we can let the loss lie or split it. We know that, domestically, courts are adverse to loss-splitting. One might speculate that this aversion owes something to a fear of facilitating judicial cop-outs. However, where careful analysis points out that there is no good reason to inflict (or leave) the loss on (or with) one of two parties, this fear might be misguided. Particularly where the case engages more than one legal system, the admission that no one party deserves to win outright might be the best solution; in a geographically complex case such an admission in no way dilutes the value (in terms of predictability and certainty) of the rules of each separate jurisdiction.

3. Maspons v. Mildred introduces the third ~~term that we~~ shall use in our analysis of conflicts cases, the "no conflict". It is sometimes referred to as the "Unprovided-for-Case". See, e.g.,

Crampton, Currie & Kay, Conflict of Laws, 3rd Ed. 1981, pp. 303-309. Such a case is one where the purposes of neither rule would be forwarded by their application to the facts of the case. In other words we have no reason for doing anything with the case. A decision could be justifed on the ground that the plaintiff has given no compelling reason why the loss should be shifted to the defendant. Traditional conflicts analysis has no methods for either identifying or handling such a case. (Though Morris can see that Bondholders is a "false conflict". Why can't he see that Maspons v. Mildred is, if you like, a "double false conflict"?) Rule 168 in Dicey and Morris states: "The rights and liabilities of the principal as regards third parties are, in general, governed by the proper law of the contract concluded between the agent and the third party."

Maspons v. Mildred is referred to as an authority for this rule. This rule is a rather delightful sidestepping of the issue, for underlying the different rules in that case is the fact that whether T or P bears the risk of A's insolvency depends on whether A is a contracting party. In the common law, there can be no contracts between T and a disclosed A: the only contracting parties are T and P. This is the reason a person cannot sue a store clerk personally for breach of the contract of sale made between the person and the store.

The interesting feature of Maspons v. Mildred is that it is a difficult case precisely because there is no contract answer. The case is, as we shall see analogous to a tort case. This point leads to a further interesting speculation, is it possible for there to be a "no conflict" case in contracts? There do not appear to be any contracts cases of this kind. All the cases discussed by Crampton, Currie & Kay are torts cases. As we shall see, even some torts cases that might at first sight appear to be "no conflict" cases, later turn out to be false conflict cases. The answer to this problem lies, I believe, in the fact that in contracts cases there is always a "fall-back" position: we enforce the contract unless there is a good reason not to. Notice that there is no "fall-back" position in the facts of Maspons v. Mildred. The absence of a "fall-back" position, of a common shared value (like the value of enforcing contracts) suggests that conflicts cases may, as the preceding note suggests, require a solution that is not the solution that either jurisdiction would reach in every domestic case. Do we always have a "fall-back" position in every domestic case? If so, what is it? Can it provide a principled solution to conflicts cases?

4. The next case takes us back into an area that is, at least in appearance close to contracts. Once again this appearance may be an illusion. The case is always cited in connection with the

proper law of the contract. What are the contracts issue? How would you defend the decision if you were asked to do so? Is there a choice of law issue here? An understanding of the traditional agency-conflicts rules may be a helpful background to an attempt to answer these questions.

The traditional conflicts approach to agency cases is summarized by E. Goldfarb, in "Agency and the Conflict of Laws: a Critical Reassessment" (1977), 35 U.T. Fac. L. Rev. 26.

> ... The salient features of what I have termed the "traditional approach" to such cases can be summarized as follows:
>
> (1) An agency was considered to involve two contracts. The first was the internal contract between the principal (P) and the agent (A). This has been termed the "contract of agency". The second was that contracted between A and the third party (T). By a legal fiction this contract was also deemed to be a contract between P and T (the "third party contract").
>
> (2) The issue giving rise to the conflict of laws was held to be within the scope of one or the other of these two contracts.
>
> (3) The choice of law issue was then resolved by the application of the choice of law rule for contracts: that is, the proper law of the relevant contract was held to be the law which governed the issue in question.

Ms. Goldfarb elaborates on the traditional approach, at p. 28, as follows:

> As in other conflict of laws situations, the choice of law issue in agency cases has traditionally been resolved by the mechanical application of rules. Early cases established two rules which have been restated by Dicey thus:
>
> Rule 167: An agent's authority, as between himself and his principal, is governed by the law with reference to which the agency is constituted, which is in general the law of the country where the relation of principal and agent is created.
>
> Rule 168: The rights and liabilities of the principal as regards third parties are, in general, governed by

> the proper law of the contract concluded between the agent and the third party.

> Although Dicey argues that the question of P's liability falls within the scope of Rule 168, some cases have recognized a third rule, based on the view that A's authority can be treated as distinct from the contract of agency and the third party contract. The power of A to bind P is, in this view, determined by the law of the country in which A acts, at least in situations where P has authorized A by power of attorney to act for him in that country.

This third rule was applied in the case we shall now examine:

Notes and Questions

1. Chatenay implicitly deals with the agency principle (in contrast to the contract principle) that A might have the power to bind P in excess of the power given to him by P. Whether or not A has such power in a particular case, in agency law, depends on whether A had apparent authority to bind P in the manner in which he purported to do vis-a-vis T. The principle of protecting T's in cases where A acted within the scope of his apparent authority is common to both Brazilian and English law. The point of possible divergence between the two systems of law concerns the scope of that apparent authority. The question on which the case, domestically, would turn is, "What is the apparent authority of A on these facts?"

The court articulated a choice of law rule regarding the scope of apparent authority, as follows: "... if ... the intention [of the P] appears to be that the authority shall be acted upon in foreign countries, it follows that the extent of the authority in any country in which the authority is to be acted upon is to be taken to be according to the law of the particular country where it is acted upon." English law was thus applied to determine the extent of A's (apparent) authority.

2. The principle which appears to underlie the judgment - though not clearly articulated by the court - appears to be to the effect that where P sends his A into a foreign jurisdiction he is aware and can expect that that jurisdiction's law might be applied in determining the degree to which he is responsible for A's acts. This determination is quite different from the determination of a contractual dispute. That is, the analysis cannot be confined to a contracts-conflicts approach, whether we focus on the P-A contract or on the P-T contract (which last contract some view as a convenient fiction which allows the contract concluded between A and T to be seen as a P-T contract).

3. The question would then be whether in formulating a choice of law rule with respect to the scope of A's authority, the court might just as logically have placed the risk of loss on T where T is aware that the agency relationship was created in a foreign jurisdiction. Is there any particular reason to prefer T's, as the court's rule does? Is the notion that P's rights and liabilities should be decided according to foreign law (whether or not adverse to him) correct? What possible factors might enter into a determination of the scope of A's authority, if we were to abandon traditional rules for choosing jurisdictions? What might be the reasonable expectations of P's and of T's with regard to the consequences of A exceeding his actual authority in multistate transactions? Is the statement (accepted in Chatenay) that P expects to have the law of the place where the agent transacted applied any more, or less, convincing than the

following statement, presented by Goldfarb, in "Agency and the Conflict of Laws", supra, at p. 32:

> ... when both P and T are innocent and no law protecting either is relevant (or more than one is), it would be more reasonable to choose to apply the law of the country whose rule would place upon P the burden of his agent's improper act.

It should be noted that this statement of Goldfarb's was made in the context of the Chatenay case. Goldfarb considered it relevant to her conclusion that the "English law was intended to protect English P's, and the Brazilian rule to protect Brizilian T's; but here we had a Brazilian P and an English T." (p. 32). Given this analysis of Chatenay, Goldfarb writes, it is proper to articulate a principle of preference for conflicts of this sort. This statement is a reflection of her preference. Before going on to consider the validity of such a preference in the context of agency law, it might be advisable to pause to consider Goldfarb's approach to the purpose, or intent, of the English and Brazilian laws. When might the law of one jurisdiction "intend" to protect only the people of that jurisdiction, so that that law becomes irrelevant if the person invoking its protection is not one of the people of that jurisdiction? Such a narrow view of the ambit of a rule of law may or may not be justified, depending on the nature of the law. It is crucial, then, to look at the nature of the laws in issue in Chatenay.

A first principle in agency law is to place the onus on T's to demand proof of A's authority; if T does not do so, and it turns out that A exceeded his authority, the loss will fall on T. This first principle, however, is displaced (for reasons of business efficiency and fairness) where A acts within the scope of his apparent authority. In such a case P, who created the agency relationship, is held responsible for his agent's acts.

Goldfarb's statement with regard to Chatenay seems to focus on this second principle, insofar as it prefers T's. Her caveat on the principle of preference (viz. that both P and T are innocent) may, however, leave one with the feeling that she has not answered the agency question in the case.

The court's approach does not have recourse to either of the above stated agency principles in its choice of law process. However, the result of that process is that English law is chosen to govern the case. At that point, both of the agency principles referred to will enter the process of dispute resolution. It is important to note, however, that the choice of law process itself is undertaken in the abstract, in the sense that it is carried

out without regard to the agency principles relevant to the dispute. That is, the court's analysis perceives the choice of law process as a preliminary issue, in itself abstracted from those agency principles which would be the focus in a domestic case.

Goldfarb's analysis seeks to ask whether there is a reason to apply either Brazilian or English agency rules. Having concluded--whether or not convincingly--that there is no reason to apply either law, she develops a particular conflicts rule geared to agency principles. This rule, or principle of preference, might be seen as a third substantive agency law, which coincides with neither the Brazilian nor the English law. Does this rule seem to you to be a good one? Is it overly comprehensive, and if so what factors should be introduced to endow it with more flexibility? Answers to these questions naturally would involve a serious grasp of agency law. For the purposes of this course, it is more to the point to recognize that the complexity of substantive laws cannot be ignored in developing approaches to conflicts of laws.

The Chatenay case confronts two laws which are essentially the same, viz. that T's are protected when A's act within the scope of their apparent authority. The principal question, then, should be as to what "apparent" comprehends. When it is reasonable for T to assume that A is acting within his authority, T is protected under both English and Brazilian law. The facts that might give us some clue as to T's reasonableness in Chatenay are absent from the judgment. The court does not tell us why their English legal minds would see T as being reasonable, or why Brazilian legal minds would (as the judgment seems to assume) see T as being unreasonable.

In Chatenay, too, we are left to wonder why the court assumes that under English law A's acts were outside the scope of apparent authority, whereas under Brazilian law, those acts were within that scope. For all that we can tell from the judgment, a careful examination of the Brazilian and English laws might have yielded the same result. Whichever legal cap one dons, apparent is apparent is apparent. Moreover, synonyms for apparent also mean apparent. The trap of semantic sham should be avoided where possible.

4. Goldfarb's approach may be preferred to that of the court insofar as it begins with the agency issues in mind. However, the satisfactory resolution of geographically complex agency cases cannot be assured merely by replacing choice of law rules which operate in the abstract by choice of law rules which incorporate the substantive issues of the dispute, be they contract, agency, or tort issues.

C. 3. Agency...

5. There is no easy answer to the Chatenay problem, but if we are to develop alternatives to what we perceive to be irrational decision-making processes, we must probe the alternatives: Do they operate more rationally? Are their imperfections less disturbing than those of the traditional rules? It is also important that in our efforts to develop better approaches, we bear in mind the dangers of overly expansive rules. Rules are made to meet particular fact situations, and inroads on them (which inroads become new rules) are needed in order to accommodate different fact situations. To begin an analysis of a conflicts problem by focussing on the issues that would be considered important in a domestic case requires that we also note the particular facts, as we would do in a domestic case.

6. Dicey and Morris also claims that Chatenay supports Rule 168. Is it not apparent that such a rule is pregnant with unarticulated assumptions that are completely ignored? Does it help to regard the basis for making P liable when A acts without the scope of this apparent authority as an estoppel? Is there an important characterization issue here?

7. Can you suggest a solution to the following problem? The facts are those of Ruby Steamship Corporation Ltd. v. Commercial Union Assurance Co. Ltd. (1933), 150 L.T. 38; 39 Com. Cas. 48 (Eng. C.A., Scrutton, Greer and Romer, L.JJ.).

> In England an insurance broker, as agent for the insured, is liable to the underwriter for payment of the premiums. The underwriter cannot cancel the policy because of an insured's non-payment. The broker can cancel only with the authority of the insured. In the United States a broker is not liable to the underwriter for payment and has, therefore, no interest in the cancellation of a policy. Rather, the underwriter may cancel if the insured fails to pay. In the Ruby Steamship case an American broker purported to cancel a policy placed with an English underwriter without the consent of the insured. The insured sued the underwriter after its ship sank. Scrutton, L.J., applied New York law (i.e. the proper law of the contract between principal and agent) not English law (i.e. the proper law of the contract between agent and third-party underwriter) to relieve the English underwriter of liability to the insured. Is it relevant that the insured was a Canadian company which purchased the ship with insurance already in place?

IV. TORTS REVISITED

Introduction

We have seen that the analysis of the traditional type in contracts conflicts cases was unresponsive to any contracts values. At the same time, of course, we saw that the rules were so open-textured or vague that any result could be justified under the proper law approach. This feature of the rules at least permitted a court to be covertly responsive to contracts values. A much more serious problem exists in torts cases with traditional conflicts rules. Here the rules are worded in a much more peremptory way and, by their excessive focus on the law of the forum, prevent any real possibility of there being even a covert response to tort values. Yet, as you might have expected, even there the pressure upon the courts to decide cases satisfactorily cannot be denied and courts occasionally struggle mightily to reach satisfactory results.

We can do what we did in our examination of contracts cases to see what might be behind some of the torts cases. First, we can set out what might be the torts issues underlying the conflicts cases:

J.G. Fleming, The Law of Torts, 6th ed. (Sydney: The Law Book Company Ltd., 1983) pp. 2-13 (footnotes omitted)

Tort values

The law of contract exists, at least in its most immediate reach, for the purpose of vindicating a single interest, that of having promises of others performed. This it does either by specifically compelling the promisor to perform or by awarding the promisee damages to put him in as good a position as if the promise had been kept. Thus while contract law as a rule assures the promisee the benefit of the bargain, tort law has the different function of compensating injuries or losses. Moreover, by comparison the interests vindicated by the law of torts are much more numerous. They may be interests in personal security, reputation or dignity, as in actions for assault, personal injuries and defamation. They may be interests in property, as in actions for trespass and conversion; or interests in unimpaired relations with others, as in causing injury or death to relatives. Hence the field covered by the law of torts is much broader, and certainly more diverse, than that of contract.

According to another distinction, tort duties are said to be "primarily fixed by law", in contrast to contractual obligations which can arise only from voluntary agreement. Certainly, in classical theory, the function of contract is to promote voluntary allocation of risks (typically but not exclusively, commercial risks) in a self-regulating society, while tort law allocates risks in accordance with community values by the fiat of court or legislature. But this distinction, though still fundamentally sound, has become somewhat blurred as the area of self-regulation by contract is being progressively narrowed by regulatory legislation and judicial policing for fairness inspired by collectivist and egalitarian ideals. Besides, contractual terms (where not expressly spelled out) are "implied" (imposed) by law and usually identical with tort duties arising from one party's "undertaking" to act for another, as in the case of professional and other services.

V. TOWARDS A PRINCIPLED APPROACH

> "It is said that 'taught law is tough law'; it is tough at least among the teachers. They draft a rule and rehearse it so frequently that they believe it to have divine authority. At times it continues to be rehearsed and taught long after the living law of decision and application has taken another channel."
>
> Corbin on Contracts, Vol 4. §836, p. 355.

1. Introduction

The analysis of this Part has been concerned to show that the traditional choice of law rules as developed by both the courts and academics are not just wrong in point of detail, but fundamentally wrong. It is not overstating the strength of my criticism to say that the rules are contrary to all the values that the law stands for. They cannot operate fairly, for a court to manipulate them to make sense of the problem before it is to deny the parties any chance to participate fully in the process of adjudication. Tinkering with the rules only leads either to even more bizarre results (e.g., McElroy v. McAllister), or to a fundamental inconsistency in the theoretical approach (e.g., the confused discussion of Castel and Dicey and Morris on Bondholders and "false conflicts). Any solution must, therefore, start from the very beginning.

We can get some idea of what is involved from an examination of the development of American theories and ideas. The discussion that follows is brief, perhaps even to the extent of being misleading. The bare bones of the development outlined here will be supplemented by the discussion in class. The cases that are reproduced are, once again, more for ease of future reference than for detailed study before class. Their importance and role in the development of the modern American ideas will be briefly indicated in these notes.

You will remember that one of the most potent forces that have created the modern American law was the Realist Movement that dominated much American thinking in the early years of this century. The principal contribution of that movement was the demonstration of the fundamental inadequacy of conceptual or formalist thinking in the law. Formalism or conceptualism was an approach to legal problems characterized by a belief that the law was a logical enterprise and that the business of judging was the deduction from certain concepts - consideration in contracts, the corporation in corporate law, etc. - of the appropriate rule to decide the case before the court. What the law should be, or what values it should seek to forward were formally irrelevant. You will have seen many

examples of that kind of reasoning in all of your other courses. It has, of course, been the dominant theoretical perspective in conflicts.

It was obvious to any one that in spite of the acceptance of formalism, the courts were always prepared to manipulate doctrine or the concepts of the law to reach results that were consistent with their perception of the values that should be considered. You have only to go back over the cases in this course, or any other course, to see clear evidence of that fact. The realists forced people to look behind the formal rules to what was actually going on, and in so doing, demonstrated the inadequacy of the traditional approach.

Though we call formalism the "traditional approach", the rise of formalism can be traced to a convergence of several ideas about the middle of the nineteenth century. One was positivism, particularly that of the Benthamite or Austinian variety, another was the perception of the dominance of Parliament, and the consequent subservience of the courts. (This latter idea is associated with the views of Dicey on the "Sovereignty of Parliament".) Another fact was the rise of the legal academic, and his (not then, her) desire to play a role in the development of the common law by the courts. This role was seen as being the development of the "principles of the common law", and found expression in works like Pollock's textbook on contracts, Salmond's book on Jurisprudence, and of course, Dicey's work on Conflicts. More general philosophical ideas like moral scepticism ("Who am I to say what is the proper value to be forwarded in this case: I, as judge, am merely the inert conduit by which you are zapped by the rules of the common law". This statement is a paraphrase of the judgment of the House of Lords in Foakes v. Beer (1884), 9 App. Cas. 605) also played a part in supporting the belief that the judge or academic commentator had no duty to say what the law should be, and why. Another expression of the same attitude was the constant glorification - a word that is justifiably used in this context - of the "genius of the common law", and its capacity to produce a "scientific" model of the law. (The nineteenth century faith in science, and the familiarity of many educated people, or their belief that they were familiar with it, also played a part in creating the dominance of formalism.)

The contribution of the Realists, Llewellyn, Cohen, Frank, was in the beginning almost entirely negative; they were concerned to attack conceptualism and formalism wherever they found it. Some of their writing is wonderfully vituperative: Cohen, "Transcendental Nonsense and the Functional Approach". The negative aspect of their contribution almost exactly parallels that of the Critical Legal Studies people today.

Once the structure of formalism had been demolished, it became necessary to rebuild something to take the place of the old theory. This rebuilding was undertaken by writers with whom you are already familiar: Fuller, Corbin, Prosser, Scott. These writers tried to take the law of contracts, for example, out of the formalist tradition by developing rules or principles which could be based on the acknowledgement of the relevance of the values that the law had to respect. The famous article by Fuller & Perdue "The Reliance Interest in Contract Damages", written in 1936, is firmly in this tradition.

The last dying gasp of the formalist tradition in America was the publication in the early 1930s of the Restatement of the Law by the American Law Institute. The Restatement of Contracts was, for example, firmly in the formalist tradition as exemplified by Williston, who was the Reporter. Corbin was his assistant and he managed to plant a number of "time bombs" in the Restatement, some of which went off, e.g., §90, dealing with the protection of reliance. The formalist tradition was the dominant force behind the creation of the Restatement of Conflicts. The Reporter was Joseph Henry Beale, who was deeply committed to the formalist tradition and who developed rules very much along the lines of those in Dicey.

The person who played the same role in the development of a new approach to Conflicts as Fuller and Corbin played in the development of contracts was David F. Cavers. His major article was "A Critique of the Choice of Law Problem" (1933), 47 Harv. L. Rev. 173. In this article, Cavers simply asked why conflicts cases could not be decided like any other cases. The most famous sentence in this article is: (p. 193)

> "The choice of that law [i.e., the rule for decision in any case of geographically complex facts] would not be the result of the automatic operation of a rule or principle of selection but a search for a just decision in the principal case"

Earlier in the article he had said: (pp. 187,188)

> "Not infrequently, in the administration of domestic law, there arise situations in which two lines of authority pointing in opposite directions, seem open to a court. Those situations may at times be clarified by the precipitant of judicial intuition, but more often they bring to the fore the manifestations of judicial intellection. They demand a penetrating analysis of the controversy and the transaction out of which it arose, an exacting inquiry into and appraisal of the competing rules, a deliberate weighing of the equities. In such a case there may be consequent on the decision the growth of one rule, the stunting of another. But regardless of whether this be so, there is very definitely a heightening of the court's responsibility to the parties. The decision cannot

> be attributed to the wisdom of the judges of times past, for it must disregard the wisdom of judges equally dead and equally wise. Compare the situation which a novel conflicts case presents. Two rules of law are invoked; usually the selection of either will determine the case in favour of the party urging its choice. That selection will probably not contribute materially to the development of the rule so chosen. In that sense the case differs from its domestic analogue. From the standpoint of the parties, however, is there not a comparable responsibility upon the court? Their transaction, because of its interstate character, has placed them in a position where each may, with some justification, urge the protection of a recognized rule of law. The choice between these rules, even as a precedent for future choices, may not be of great social significance. But does this discharge the court from a painstaking examination of the same factors whose materiality would be admitted were the case a purely local one, together with those additional factors which the interstate character of the transaction raises into prominence?"

Cavers did not immediately develop these ideas. He went into other areas, then the war intervened and he temporarily left teaching. After the war, there arose a growing disenchantment with the traditional rules of conflicts. Some cases openly manipulated rules found to be unsatisfactory. The beginning of a new academic interest in the problem of the choice of law was led by Brainerd Currie.

Currie suggested that the central problem in conflicts was the notion of "governmental interests". His theory is outlined in the article which follows. The general idea that Currie outlined here became known as "interest analysis". Its principal features can be seen from what Currie wrote in 1959.

VII. CONCLUSION

1. Uniformity and Diversity

There is one further dimension to the role of the Supreme Court of Canada that needs to be mentioned. The resolution of the true conflict problems of Lilienthal v. Kaufman, O'Connor v. Wray and Going v. Reid Bros. could present the Supreme Court with the need to choose between a solution that accepted as inevitable the fact that different provinces might, for perfectly valid reasons, reach different results, and one that said that there had to be a uniform standard. Pigeon, J., in Ipco appears to accept the unifying role of the Supreme Court as an accomplished fact. (See, supra p. 471). It is not clear from that case whether he really sees the significance of what he is saying. What is at stake can be seen from another angle: the role of the Federal Court of Canada. It must, however, be admitted immediately that, for a variety of reasons, what may be seen in this way may be seen only "through a glass, darkly."

The issues facing Canada can be most clearly seen from the U.S. experience. Notice that the decision in Hague was an appeal from a decision of a state court. The Supreme Court deplored the state court's choice of law rule, or, to be precisely accurate, they deplored its decision to apply its own law, even though Minnesota's doing so would neither be the result reached by a Wisconsin court (though the purposes of "stacking" or "anti-stacking" rules are not transparently obvious), nor a violation of the XIVth Amendment. The question that has exercised some American commentators is whether a choice of law rule like Minnesota's should be applied by the federal courts.

The problem arises in this way. The jurisdiction of the U.S. Federal Courts, the District Courts, is available in a far wider range of circumstances than is the jurisdiction of the Federal Court of Canada. What is most relevant for our purposes is the jurisdiction of federal courts in the U.S. in "diversity cases". Basically this phrase means a case in which the parties are citizens of different states. The actual rules do not concern us here. One of the early problems of the U.S. federal courts was what law they should apply. Should a federal court in New York, for example, accept as the basis for its decision, the rule propounded by the New York courts or the rule that the federal court might think would be more appropriate. The initial resolution adopted the latter option: Swift v. Tyson (1842), 16 Pet. 1; 10 L. Ed. 865. Such a rule would be plainly unworkable. The result in a case, a case presenting no facts of geographical complexity relevant to the merits, would depend on where the action would be brought, in the state court or in a federal court in the same state. The rule laid down in Swift v. Tyson lasted until it was overruled in Erie Railroad Co. v. Tompkins (1938), 304 U.S. 64; 58 S. Ct. 817. Erie established the rule that a federal court was bound by state court determination of state law. This

seemingly simple proposition is, however, by no means free from difficulty and it raises all the problems of determining what the "law of a jurisdiction" is. There are, of course, rules of any jurisdiction that are very clearly established and these can be easily applied. There is a very large body of the law of any jurisdiction upon which it is nearly perfectly safe to rely. Such rules include those for ensuring that a corporation is properly created, that a person gets good title to property, that a loan can be enforced, etc. There are, however more debatable rules. The problem presented by Erie is how a federal Court is to determine what the law of a state is in a matter of controversy or doubt. What if there are conflicting decisions of co-ordinate courts? What if a rule is plainly an anachronism? Since the Circuit Court of Appeals and the Supreme Court itself are federal courts, are they bound by the decision of a state equivalent of a provincial or county court? (Notice that the true conflict problems of O'Connor v. Wray and Going v. Reid Bros., even if one opts for diversity, do not raise the problems implicit in Erie for the Supreme Court in a case that has started in a provincial court and not in a federal court. An appeal lies to the Supreme Court only from a decision of the Provincial Court of Appeal, which court may be regarded as authoritatively pronouncing upon the precise point of provincial law relevant in the case. It is not as if an "outside" court had to ask itself what the provincial court of appeal would do if it considered the case. The court of appeal has, for the particular case before it, at least, resolved all problems of what the law of the province is. The problems of Erie arise precisely because a federal court is NOT a state court. The true conflict (diversity option) is possible only because provincial courts can be regarded as articulating in an authoritative way the values of a province as they are relevant in a particular case.)

The problems do not end here. Erie held that in a case where, as to the merits of the dispute, there were no geographically complex facts, the federal courts must accept state court determinations of state law. But what happens in a case when the decision on the merits presents geographically complex facts? The U.S.S.C. in Klaxon Co. v. Stentor Electric Manufacturing Co., Inc. (1941), 313 U.S. 487, 61 S. Ct. 1020 held that, as a necessary consequence of Erie, federal courts must accept state court determinations of conflicts rules. Mr. Justice Reed, who delivered the opinion of the court said in support of this conclusion (pp. 496, 497):

> We are of opinion that the prohibition declared in Erie Railroad v. Tompkins, 304 U.S. 64, against such independent determinations by the federal courts extends to the field of conflict of laws. The conflict of laws rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware's state courts. Otherwise the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side. See Erie Railroad v. Tompkins .... Any other ruling would

> do violence to the principle of uniformity within a state upon which the Tompkins decision is based. Whatever lack of uniformity this may produce between federal courts in different states is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors. It is not for the federal courts to thwart such local policies by enforcing an independent "general law" of conflict of laws. Subject only to review by this Court on any federal question that may arise, Delaware is free to determine whether a given matter is to be governed by the law of the forum or some other law. ... This Court's views are not the decisive factor in determining the applicable conflicts rule. ... And the proper function of the Delaware federal court is to ascertain what the state law is, not what it ought to be.

The issue raised by Klaxon and which is implicit in Erie is the extent to which uniformity or diversity is desirable or acceptable as a matter of one's view of what kind of federalism one should have. The argument centres on the statement made by Pigeon J. as regards the unifying role of the Supreme Court. An argument can be made (and is made, for example by Hart and Wechsler, The Federal Courts and the Federal System, 2nd Ed. Bator et al. (Eds.) Mineola; Foundation Press, 1973, pp. 713-715) that the role of a federal court is not the same as that of a state court and that, in a federal court, there are no conflicts problems between state laws because the point of view of the federal court is national and not local. The editors of the 2nd Edition of Hart & Wechsler do not share the view of Klaxon taken by the original editor, but they summarize the latter's view (pp. 714-715):

> In the first edition of this book (pp. 634–35), the authors marshaled the arguments against Klaxon as follows:
>
> Consider the application of Erie and of Klaxon to problems of the choice of plainly substantive rules of decision, such as those involved in Erie itself and in Swift v. Tyson.
>
> Notice again that these rules do much more than provide the underlying premises of a decision on the merits when litigation occurs. They help to organize and guide people's everyday lives. Notice that confusion and uncertainty about the rules of law which are relevant at this stage of primary private activity is far more serious than uncertainty about rules which become material only if litigation eventuates. This is so, if for no other reason, because the number of instances of the application of law at the primary stage bears to the number of instances of its application in litigation the ratio of thousands or hundreds of thousands to one.
>
> As applied in non-conflicts situations, Erie might have been regarded, might it not, as based at least in significant part on the proposition that it is intolerable to have two different systems of courts deciding questions of 'plainly substantive' law differently, where it is unpredictable which system will acquire jurisdiction, since that not only introduces an element of retroactivity into every judicial disposition of such disputes as develop but con-

fuses basic legal relations throughout the area of primary activity affected by the overlap? Notice that it was in the context of questions of this kind that Justice Brandeis spoke of the 'unconstitutionality' of the course which the federal courts had pursued. See Hill, *The Erie Doctrine in Bankruptcy*, 66 Harv.L.Rev. 1013, 1031–35 (1953).

If this view of Erie had been taken, the problem of marking out the scope of its application in non-conflicts situations would have reduced itself, would it not, to one of distinguishing between (a) those rules of law which characteristically and reasonably affect people's conduct at the stage of primary private activity and should therefore be classified as substantive or quasi-substantive, and (b) those rules which are not of significant importance at the primary stage and should therefore be regarded as quasi-procedural or procedural?

Consider the bearing which such an analysis of Erie would have had in situations involving state-versus-state conflicts of plainly substantive law.

Notice that Swift v. Tyson had solved the problem of uncertainty about the applicable substantive law for people who could anticipate access to a federal court. Erie destroyed this assurance, but mitigated the damage with an alternative assurance of the uniform enforcement in any federal court of whatever state law was applicable. Klaxon destroyed the mitigation, did it not?

Erie must largely have proceeded upon the assumption, must it not, that the prime need was for an assurance of state-federal conformity in the interest of people who could not be sure of a federal forum? Klaxon cut down the value of this new assurance, did it not, largely to those situations in which it is possible to foresee the state in which litigation will take place? In what proportion of situations *is* this possible, when the people involved are of diverse citizenship?

Would it be accurate to conclude that Klaxon, in effect, treats Erie as if it had been unconcerned with the problem of uncertainty about the applicable substantive law at the stage of primary private activity? Was it necessary to do this? Why should forum-shopping between different courts in the same state have been regarded as the *summum malum* of diversity litigation while forum-shopping among courts in different geographical areas was dismissed as an inescapable weakness of a federal system? Did the Rules of Decision Act have to be read as authorizing the plaintiff, and the courts of the state he selects, to decide which state's laws are the laws which 'apply', rather than the federal court?

(Note, the references to "primary private activity" and "primary activity" come from Hart and Sachs, The Legal Process, Tentative Edition, 1958, pp. 210 et seq. The Hart of Hart & Sachs is the same person as the Hart of Hart & Wechsler.)

Now we can put this issue back into the context of the Federal Court of Canada and see where we go. It is first important to notice that the jurisdiction and importance of the Federal Court of Canada are far less than those of the U.S. federal courts. Yet it is clear that the Canadian courts have to face the issue of Erie (and if Erie has to be faced, can Klaxon be far behind?). The scope for an Erie doctrine in Canada has not been squarely faced in Canada, though

there are cases where it is assumed to apply: Stein v. The Ship "Kathy K", [1976] 2 S.C.R. 802; 62 D.L.R. (3d) 1. The Supreme Court gave more or less automatic acceptance of the relevance of the apportionment legislation (Contributory Negligence Act, R.S.B.C. 1960, c. 74 (now Negligence Act, R.S.B.C. 1979, c. 298)) Ritchie, J., said "I can see no reason why a claim under ... the Federal Court Act should not be governed in that court by the substantive law of the province concerning division of fault"(p. 823 (S.C.R.), p. 16 (D.L.R.)) may now be far more contentious after certain later cases in the Supreme Court. (See, Laskin and Sharpe, "Constricting Federal Court Jurisdiction: A Comment on Fuller Construction" (1980), 30 U.T.L.J. 283, 300-301.)

The most fruitful sources of the problem of choice of law in the federal court arise in the exercise of that court's admiralty jurisdiction. This jurisdiction is based on s. 22 of the Federal Court Act, R.S.C. 1970 (2nd Supp.) c. 10 (as amended). There have been a number of cases concerning claims against stevedores and the effect of "Himalaya Clauses" in bills of lading (Mijda Electronics, Inc. v. Mitsui O.S.K. Lines Ltd. (1981), 124 D.L.R. (3d) 33, Saint John Shipbuilding & Dry Dock Co. Ltd. v. Kingsland Maritime Corp. (1981), 126 D.L.R. (3d) 332 (Fed. C.A.)). The latter raised a choice of law issue, whether a contract was governed by Swedish or New Brunswick law. The court in this case held that the parties had expressly chosen that the contract would be governed by New Brunswick law. The basis for this conclusion was the court's holding that a purchase order between the shipper and carrier expressly providing for the application of New Brunswick law was paramount over a bill of lading issued by the carrier expressly providing for the application of Swedish law. By the latter law the stevedores would be protected. They would not be protected, so the court held, under New Brunswick law. (As a contracts case, the issue presented is reminiscent of the "Battle of the Forms", but the court ignored this.) As a conflicts issue, the court decided that whether the stevedores should be protected was to be decided by which law governed the contract between carrier and shipper, regardless of the fact that, ex hypothesi, the stevedores were third parties.

The issue that we are focussing on can be seen if the choice of law issue involved a choice of Quebec or New Brunswick law. On these facts it cannot be assumed that cases like Scruttons Ltd. v. Midland Silicones Ltd., [1962] A.C. 446; [1962] 1 All E.R. 1, automatically govern (in spite of cases like New Zealand Shipping Co. Ltd. v. A.M. Satterthwaite & Co. Ltd., [1975] A.C. 154; [1974] 1 All E.R. 1015) since under Quebec law, a stipulation pour autrui is clearly enforceable. Once we step outside traditional conflicts thinking the issue in a case like St. John Shipbuilding is whether the exemption clause in the standard arrangement between shipper and carrier should be given effect to or not.

This is not simply a contracts question for the evidence might be very clear that the stevedore expected the protection of the bill of lading. Since there is no conceivable purpose behind the classical third party beneficiary rule (we are, after all, only fighting over whose insurer will bear the loss) it is hard to see how the choice between the provincial rules in conflict could be rationally made. (Cf. La Van v. Danyluk, supra, p. 370).

But, if we leave that issue aside, should the federal court simply choose as might a provincial court between the rules in conflict, or should it act in some different capacity? This issue can be put in Currie's terms. A New Brunswick court might somehow feel able to say that some purpose of New Brunswick law would be served by its application to the case so as to deny protection to the stevedores. Similarly (and more easily) a Quebec court may say the same. Is the federal court not put in the awkward position of either being a disinterested forum or having to find a Canadian value? Notice that this distinction might, however, collapse. Unlike the U.S. federal courts, the Federal Court of Canada does not sit in any particular place and become identified with the law of that place. A case like St. John Shipbuilding could be litigated anywhere in Canada. (See, Federal Court Act, ss. 14, 15.)

(Note also that the power of the Federal Court to arrest a ship anywhere in Canada is not only a very effective way for a plaintiff to get an effective judgment against the defendant but also greatly increases the chance of difficult choice of law rules arising in the court. For a discussion of the relation between the power to arrest and forum conveniens see, Kuhr v. The Ship "Friedrich Busse", [1982] 2 F.C. 709; 134 D.L.R. (3d) 261.)

On the actual facts of St. John Shipbuilding the court could, because of the express choice of law clause fall back on what can be regarded as a contracts basis for the decision. (This is, of course, hard to understand and apply given that both carrier and stevedore (and probably shipper) would, if they had been asked, have said that they expected the standard "Himalaya Clause" to apply). In Mijda Electronics the action arose out of theft of goods stored in a warehouse in Montreal. The Federal Court of Appeal ignored the provisions of the Quebec Civil Code and applied "Canadian Maritime Law" (the phrase used in s. 22 of the Federal Court Act) which was assumed to be the common law. LeDain, J., goes on to apply New Zealand Shipping and Port Jackson Stevedoring Pty. Ltd. v. Salmond & Spraggon (Australian) Pty. Ltd. [1981] 1 W.L.R. 138, [1980] 3 All E.R. 257 (P.C.) to hold that the stevedores might have had the protection of the "Himalaya clause" had it been broadly enough drafted to protect them. (On the last issue he ignores all the lessons of Gillespie Bros. & Co. Ltd. v. Roy Bowles Transport Ltd., [1973] Q.B. 400; [1973] 1 All E.R. 193, and Photo Production Ltd. v. Securicor Transport Ltd., [1980] A.C. 827, [1980] 1 All E.R. 556. No account is taken of the contracts point that the parties, both as to the third party issue and to the interpretation issue might not have had the common law in mind.)

It can be seen from these cases that the federal court has not come to grips with the choice of law issues implicit in its decisions. Should it forward in St. John Shipbuilding the sensible rule of giving protection to stevedores even though a New Brunswick court might not? This issue is Erie, is it not? But if there is a true conflict, and if the federal court has no provincial perspective because it may not even be sitting in New Brunswick, can it do anything else but resolve the issue on some broader basis? Is it satisfactory (and consistent with Canadian federalism) to assume a basis for uniform decisions, and which just happens to be the same as the common law?

The issue is made even more complex since as Laskin and Sharpe (supra) pointed out, the jurisdictional limits of the Federal Court may preclude its consideration of certain provincial rules. The conflicts issues of this "self-denying ordinance" have never even been considered. See also, Hogg, Constitutional Law of Canada (Toronto: Carswell Co. Ltd., 1977 p. 125). The phrase "Canadian Maritime Law" found in s. 22(1) of the Federal Court Act is itself interesting. The law of admiralty has very ancient roots and in many respects developed very different rules from the common law. For example, in Stein v. The Ship "Kathy K" (supra) the court refers to the fact that under admiralty rules of very long standing apportionment was possible (though only 50-50). An argument can be made that admiralty rules are the kind of rules that are both wide enough in scope and sufficiently generally accepted to provide the conditions under which the elusive goal of uniformity could be achieved. See, Ehrenzweig, Private International Law (Leyden: A.W. Sijthoft, 1967). The sub-title of this book is "A Comparative Treatise on American International Conflicts Law, Including the Law of Admiralty".

The meaning of "Canadian Maritime Law" and the history of the admiralty jurisdiction of the Federal Court are discussed by Laskin, C.J.C., in Tropwood A.G. v. Sivaco Wire and Nail Co., [1979] 2 S.C.R. 157, 99 D.L.R. (3d) 235. The jurisdiction conferred by s. 22 is broad enough to include conflicts rules. Laskin, C.J.C., says (pp. 166, 167 (S.C.R.), p. 242 (D.L.R.)):

> What is raised by the appellant, shortly put, is whether it is open to the Federal Court, in exercising its jurisdiction in the matter brought before it, to determine, pursuant to conflict of law rules of the forum, a choice of law rule to govern the determination of the suit. In the present case, the Federal Court has jurisdiction over the appellant and over the cause of action and there is a body of law which it can apply. It is my opinion that this body of law embraces conflict rules and entitles the Federal Court to find that some foreign law should be applied to the claim that has been put forward. Conflict rules are, to put the matter generally, those of the forum. It seems quite clear to me that s. 22(3) of the *Federal Court Act*, which I have already referred to, envisages that the Federal Court, in dealing with a foreign ship or with claims arising on the high seas may find it necessary to consider the application of foreign law in respect of the cause of action before it.

There are two questions arising from the quotation: where is the forum? and what is a "foreign law"? Is the forum Canada and a foreign law simply a law that is not Canadian maritime law?

These issues cannot be further explored here. The range of cases before the federal courts is sufficiently small and its jurisdictional base sufficiently narrow that it is hard to argue that the issues that have just been discussed are of great moment. They are, however, of interest in that they illustrate the extent to which we have not even begun to think through the consequences of the special role of all the federal courts, including the Supreme Court of Canada. Can that court do different things with provincial law depending on whether it sits on appeal from a provincial court or a federal court?

The recent case of ITO - International Terminal Operators Ltd v. Miida Electronics Inc., [1986] * S.C.R. ***, 28 D.L.R. (4th) 641, involves too many points to be dealt with here, and the case is too long to reproduce, bearing in mind its relevance to the central issues of this course. The case is worth considering as it has the potential to transform both conflicts and constitutional law, though as regards the latter, its impact is on some of the more arcane aspects of it.

2. The International Context

A comparison of the judgment of the U.S. Supreme Court in Hague - a judgment, incidentally, that has been fairly heavily criticized - and that of the Supreme Court of Canada in Ipco points out the problem of the scope of any conflicts approach. The claim made in the discussion of Going was that the result in that case was constitutionally prohibited on the ground that it violated the limitation on provincial power inherent in s. 92(13) of the Constitution Act. The importance of the fact that Going arises between two provinces lies in the fact that the assertion of jurisdiction in any form, judicial jurisdiction or legislative jurisdiction, can be policed or controlled by the Supreme Court. In the international sphere such control is not vested in any institution with the power of the Supreme Court. In Hague, the U.S. Supreme Court adopts a "hands off" attitude to Minnesota's assertion of legislative jurisdiction (via its choice of law rule) that is significantly closer to the international model than is the Canadian one (at least as that might be represented by the judgment of Pigeon, J., in Ipco. The Supreme Court would also, as we have seen review provincial courts' choice of law rules of the traditional type.) At the same time as the court deplores Minnesota's choice of law rule, it holds that that rule does not violate the "due process" clause of the XIVth Amendment.

If we are going to argue that, subject to the overall control of the Supreme Court (both U.S. and Canadian), conflicts cases are, ultimately transformed into constitutional cases, and that only in constitutional criteria will principled solutions ultimately be found, we have to be prepared to argue that very much the same approach must apply in international as opposed to interprovincial conflicts. It is vitally important to remember that the constitutional issue ultimately presented was the extent to which in a case of a true conflict, diversity between the results reached by two provinces could be tolerated. This issue forces us to articulate some views of federalism that either accepts diversity, or does not, as is more often casually assumed. See, e.g. Hogg, Constitutional Law of Canada, pp. 123-124 who regards uniformity of judicial decisions as a good in itself:

> "In my opinion, the uniformity of the common law throughout Canada, while perhaps at variance with some ideal model of federal issue, does not really impair provincial autonomy in any practical way. Moreover the rule of uniformity makes Canada's laws much less complicated than those of the United States, and it allows the highest court (with presumably the best judges) to apply its talents to the development of all Canada's laws, both provincial and federal."

If we can accept diversity in interprovincial conflicts, it is very easy to accept diversity in international conflicts. And even if we can't accept diversity in an interprovincial case, we can't do much but accept it in international cases. Such a view merely accepts as inevitable the fact that a Canadian court (of any province) might reach a different result from any American court or a French court. In the international sphere we, of course, not only lack any control over the unreasonable or indefensible application of forum law but

also any control over the foreign court's taking of jurisdiction. But to admit that we cannot control a foreign court does not require us either to play the ostrich and believe that traditional choice of law rules will avoid the evils we see, or to accept that there are no standards by which any court might choose to be guided. The foreign court may do nothing more dramatic than give its own rules a "moderate and restrained" interpretation and choose not to apply its domestic rules to certain cases of geographically complex facts. Were you not surprised by the decision of the U.S. Court in the Pemex Case? (Supra, p. 150). Judicial restraint is not to be unexpected even as we admit that it cannot be compelled. Ultimately, of course, a lack of restraint may lead to such methods of control or influence that the international order offers. We have already seen the consequences of a lack of restraint in the Uranium Cartel litigation and in such things as the British "Claw-back" Act. You may be sure that a large number of diplomatic notes were exchanged over the same issues. We can return to this issue and the broader one of U.S. Anti-trust policy for a brief exploration of the international problem of choice of law in the world of "realpolitik".

Conventional wisdom has it that no choice of law is possible in anti-trust cases. International law has been invoked (see The Lotus Case, France v. Turkey, P.C.I.J. Rep. Series A and 10) to justify the extra-territorial effects of a criminal law and to justify the use of forum law in criminal cases (see Severaid, "Commercial Oligations Under the Act of State Doctrine" (1976), 8 L. & Pol. in Int'l Bus. 1093 and Jones, "Extraterritoriality in U.S. Antitrust: An International 'Hot Potato'" (1977), 11 Int'l Lawyer 415). The American standard of free enterprise capitalism may be particularly inappropriate when applied to foreign cartels since United States legislation expressly authorizes American companies to form cartels for export purposes. Although international law has been invoked to justify American judicial behaviour, extra-territoriality in criminal cases is accepted by the international community as part of the general principal that consent or general practice give authority to international law (see Statute of the International Court of Justice, Article 38 and Brownlie, Principles of Public International Law, p. 3). For this reason, some American academics have been fervent in their efforts to demonstrate that American competition law is internationally accepted (see Metzger, "Cartels, Combines, Commodity Agreements and International Law" (1977), 11 Texas Int'l. L.J. 506). If internationally accepted general practice is a source of international law analogous to Federal Canadian law, then restraint where such general practice is absent is analogous to responsible restraint among provinces. Restraint is particularly desirable in international cartel cases where the activities of the defendants were approved of by their national governments and where their behaviour was similar to that encouraged for American exporters. Lack of the sort of restraint which was exercised in the Pemex Case produced a predictable outcry (see Burns, "Antitrust Under the Treaty of Rome" (1977), 11 Int'l Lawyer 369 and Handler, "The American Antitrust Experience and Its Relationship to the Regulation of Monopolistic Conditions in South Africa" (1976), 9 Comp. & Int'l L.J. of S.A. 336). Conflict is an inevitable result of one nation's ignoring the principles of restraint implicit in Article 38 of the Statute of the I.C.J. The sources of

international law found in Article 38 indicate ways of proving that actions are lawfully authorized. But actions which are not authorized are not necessarily illegal. Thus while a nation's unrestrained judicial actions may not take their authority from international law, neither may they be illegal.

Before you conclude that there is no solution except the political one and that we have left the realm of the rule of law altogether, remember that the only point of showing you what can happen in the real world is to disabuse you of the comforting illusion, an illusion as warm and comforting as any rabbit-hole, that any system of rules could do more. We have not reached a point where anarchy prevails. All that has happened is really only precisely what you would expect. As the standards for proper or responsible behaviour become looser and more difficult to enforce, there will be more diversity and more irresponsible and possibly unfair assertions of jurisdiction. But as we go back and forwards between the interprovincial and the international spheres what works in one will basically work in the other. The issues and principles are the same. What is, in the end surprising is not that there is so little law, but that there is so much.